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No. 517 15 2

In the Supreme Court of the United States

OCTOBER TERM, [illegible] 1957

OLETA O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (A. 1) has not yet been officially reported.[1]

JURISDICTION

The judgment of the court below (A. 9) was entered on July 26, 1955. A petition for rehearing was duly filed, and was denied on November 2, 1955. The petition for a writ of certiorari was filed on November 30, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

[1] "Tr." refers to the typewritten transcript of record in *Yates, et al.* v. *United States*, Nos. 308, 309, 310; "R" refers to the printed transcript of the record for this case, No. 547; "Pet." refers to the petition for a writ of certiorari in this case; "A" refers to the appendix to the petition.

QUESTIONS PRESENTED

1. Whether punishment for civil contempt for petitioner's refusal to answer, on cross-examination, certain questions on June 26, 1952, bars punishment for criminal contempt for refusal to answer comparable questions, while she was still under cross-examination, on June 30, 1952.

2. Whether it was proper to impose a punitive sentence for refusal to answer these questions on cross-examination.

3. Whether the sentence imposed was excessive.

STATUTORY PROVISION AND RULES INVOLVED

Title 18, United States Code, provides in respect to contempt as follows:

> § 401. POWER OF COURT.
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Federal Rules of Criminal Procedure provide:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

RULE 42. CRIMINAL CONTEMPT.

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On June 26, 1952, and June 30, 1952, petitioner and thirteen co-defendants were on trial in the District Court for the Southern District of California, under an indictment charging conspiracy to violate the Smith Act, 18 U. S. C. (1946 ed.), 10 and 11; *id.* (1948 ed.), 371 and 2385. The indictment alleged that they, along with twelve named co-conspirators, conspired (1) to advocate and teach the duty and necessity of overthrow of the United States Government by force and violence; and (2) to organize and help to organize

the Communist Party of the United States of America which teaches and advocates the overthrow and destruction of the United States Government by force and violence, all with the intent of causing the aforesaid overthrow by force and violence as speedily as circumstances would permit.

After the Government completed its case, petitioner took the stand in her own defense. On direct examination, she denied that she had ever agreed or conspired with anyone to advocate the overthrow of the government of the United States by force and violence; or that, according to her understanding, the Communist Party had ever had that purpose; or that she had ever had the intent to overthrow the United States Government by force or violence (80 Tr. 10703, 83 Tr. 11099, 84 Tr. 11159–11160).

On June 30, 1952, while under cross-examination, petitioner refused to answer eleven questions concerning her association with other alleged co-conspirators (Spec. I-IX). Three of the questions concerned Leon "Kappy" Kaplan. The evidence introduced by the Government showed that Kaplan had participated on a high level in Communist Party affairs in San Francisco. Kaplan's activities had been testified to by Government witness Van Dorn (59 Tr. 7903, 7930; 60 Tr. 8023, 8025, 8026, 2028, 8037). In addition, witness Honig testified that Kaplan had attended

meetings of the State and County Board of the Communist Party in 1947 and 1948 and had actually arranged one of the meetings (42 Tr. 5438–5444, 5453–5454). On cross-examination, petitioner admitted that she had been present at some of the Board meetings. When she was asked who else was present (87 Tr. 11618–11619), the following colloquy occurred:

> A. No, I am sorry I can't for the same reasons that I advanced last week. I feel that these people are in a position where my identification of them as communists would do them an inestimable amount of damage. I am willing to give names of people whom I know I cannot hurt, but where it is a question of damaging their interests, or harming their ability to make a livelihood, of hurting their families, No.
>
> Q. People that are employed by the Communist Party would not be discharged, would they, by having their names revealed?—A. People who may be employed by the Communist Party would not be discharged by having their names revealed, but members of their families can suffer the results of it in many different ways.[2]

[2] On June 26, when the Government began cross-examination, the petitioner identified defendant Carlson as one whom she had met at the Communist Party offices in Los Angeles (85 Tr. 11231–11233). She was then asked whom else of the defendants she had met there in connection with her duties and she refused to answer for the reason that she did not want to add to the prosecution case against them and

The petitioner then refused to answer (Spec. I) whether she was ever present at a State board meeting or any other meeting of the Communist Party when Kaplan was present; (Spec. II) whether, according to her understanding, Kaplan was a member of the Communist Party in 1948; and (Spec. III) whether she was present at many meetings of the Communist Party where Kaplan was present (R. 3–5). In each instance she was instructed by the court to answer and upon her refusal to do so was declared to be in contempt.

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thereby become a Government informer (85 Tr. 11234–11235). When directed by the court to answer, she reiterated her reason by stating, "I just will not be an informer, I will not play the role of a witness for the Government, I will not add to the prosecution case against people who have rested, who are putting on no further defense." (85 Tr. 11239.) In the afternoon session petitioner refused to answer, when directed by the court, four questions concerning her association with Harry Glickson and Frank Spector (85 Tr. 11309–11319). At the conclusion of the day's trial, the judge committed her to the custody of the Marshal for imprisonment "until such time as she may purge herself of the contempts by answering the questions ordered to be answered in each instance or until further order of the court" (85 Tr. 11372–73). After the trial, the judge directed her continued confinement to coerce her to answer the four questions put to her on June 26. The Court of Appeals reversed, holding that this was error since the jury had been disbanded and could not be legally recalled (A. 23). After the trial, the trial judge also imposed a punitive sentence on her for the contempt committed on June 26. The Court of Appeals also reversed this conviction, holding that, if the judge meant to impose a punitive sentence, she should have been so warned when the coercive measures were being applied (A. 33).

The fourth specification involved a question concerning Ida Rothstein (R. 5–6). Ida Rothstein had been shown as an important member of the conspiracy by the testimony of the following Government witnesses as to her activities and attendance at Communist Party meetings: Foard, 33 Tr. 4425–4429, 4432, 4435, 4438, 4447; 34 Tr. 4474; 36 Tr. 4742–4743, 4749; 37 Tr. 4773, 4777, 4811–4812, 4824–4825; Bessie Honig, 42 Tr. 5432, 5438–5444, 5450–5453; Addy, 51 Tr. 6589, 6591, 6594, 6596. The defense had introduced Exhibits GA and GB, indicating Ida Rothstein's importance in the Communist Party as far back as 1933. She had attended and helped to arrange the State and County Board meetings which petitioner had attended (42 Tr. 5438–5444, 5453–5454). She had also attended the Communist Party meetings where Glickson had made statements which petitioner had sought to disclaim on her direct examination (83 Tr. 11120, 84 Tr. 11136; see 33 Tr. 4435–4440; 34 Tr. 4475–4476).

When petitioner was asked if Ida Rothstein had not been chairman of Communist Party clubs in San Francisco for the past five or six years, petitioner replied, "That is asking me to say that Ida Rothstein is a Communist." The Government then asked her whether Ida Rothstein was known to her as a member of the Communist Party. Petitioner refused to answer.

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The fifth specification involved a question concerning Hersel or Herschel Alexander (R. 6–8). The Government had introduced evidence and exhibits and the defense had introduced exhibits showing that Alexander was an important member of the Communist Party and of the conspiracy charged, including evidence tending to show Alexander's membership on the California State Committee of the Party (6 Tr. 684; 27 Tr. 3699–3670, 3746–3749; 57 Tr. 7617–7620; 58 Tr. 7731). When asked if Hersel Alexander was a member of the California State Committee of the Communist Party for the year 1950, petitioner refused to answer (87 Tr. 11623).

Specifications VI to X involved questions (R. 8–13) put to petitioner concerning her association with certain of the co-defendants on the California State Committee of the Communist Party in 1950. She was asked and answered in the affirmative that she and defendants Schneiderman and Stack were associated together as members of the California State Committee for that year (87 Tr. 11624–11626). She was asked and refused to answer the same question as to defendant Richmond (Spec. VI), defendant Healey (Spec. VII), defendant Spector (Spec. VIII), defendant Fox (Spec. IX), and defendant Lima (Spec. X).[3]

[3] Petitioner's counsel objected to these questions on the ground that these defendants had rested their case, but this argument was abandoned on appeal.

Specification XI involved a question concerning Celeste Strack (R. 13–14). Government witness Evans had testified about the Marxist Institute, a Communist Party school, held in 1949 and 1950 in San Francisco and as to the use there of Exhibit 163, a study outline for the school; this outline contained references to many of the main writings expounding the violent overthrow of Government. Evans had stated that Celeste Strack was one of the instructors (26 Tr. 3541–3544). Petitioner Yates had testified extensively on direct examination that she had actually prepared Exhibit 163, and as to her participation in the Marxist Institute (77 Tr. 10271, 10275–10278; 79 Tr. 10547; 80 Tr. 10695). When petitioner was asked whether Celeste Strack was, for a number of years, State Educational Director of the Communist Party of the State of California, she refused to answer.[4]

[4] Petitioner had also testified on direct examination that she was chairman of the Communist Political Association in San Francisco in 1944 (77 Tr. 10353) and as to the principles of the Communist Political Association in that period (83 Tr. 11096–11100). Government's Exhibit 415 shows that Celeste Strack was likewise a member of this committee in 1944 (Ex. 415, p. 3, 27 Tr. 3842). Additional testimony showed that Celeste Strack, along with petitioner and other co-defendants, was one of the signers and sponsors of co-defendant Doyle's candidacy for a public office (34 Tr. 4560, pp. 14–15 of Ex. 580); and that she had attended meetings of the State Committee, which the defendant Yates had also attended (42 Tr. 5441–5443).

At the conclusion of the session on June 30, and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a). That is my present inclination, and deal with them independently as far as punishment is concerned" (87 Tr. 11634). At the request of counsel, immediate action was deferred (87 Tr. 11635).

On July 8, 1952, an "Order, Judgment and Certificate of Criminal Contempt" was entered as to petitioner for failure to answer the eleven questions put to her on June 30. On August 6, the jury returned its verdict of guilt in the principal case and sentence was imposed on the defendants on August 7. On August 8, petitioner was sentenced to one year for each of the eleven contempts committed on June 30; the sentences were made to run concurrently. However, petitioner was given the opportunity to purge herself and the judge upon sentencing said (R. 37):

> I am not interested in imprisoning Mrs. Yates. I am interesting in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.
>
> If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I

will be inclined even at that late date to accept her submission to the authority of the court.

The Court of Appeals affirmed this conviction (A. 1-8), at the same time that it reversed the contempt orders referred to in footnote 2, *supra*, pp. 5-6.

ARGUMENT

I

Petitioner does not dispute the fact that her refusals to answer constituted contempt (Pet. 22). Rather, she contends that her several refusals amounted to a single offense and that therefore her refusal was total on June 26 when she stated that she would not identify persons as members of the Communist Party no matter how many times she was asked (85 Tr. 11315, Pet. 22).

However, this general statement on June 26 amounted to no more than a blanket advance declaration of her intention not to be cooperative. It could hardly preclude separate convictions for refusals to answer specific questions concerning the activities and status of her various co-conspirators in the Communist Party. The questions put to petitioner were not identical; nor were they all asked on the same day. When petitioner refused to answer four specific questions on June 26, involving two persons, the court committed her to imprisonment until she should

purge herself of the contempt. The questions later put on June 30 were different and involved nine separate persons. The association of petitioner with these people had been shown and, since she had denied any participation in the conspiracy, the status of each was material and relevant (R. 32). The order for contempt did not make repetitious specification of petitioner's general intention not to answer such questions. Instead, it specified individually the eleven questions which petitioner refused to answer on June 30. This was in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure, and with the federal cases cited by petitioner (Pet. 21) in which the courts have made it clear that it is proper for refusals to answer different questions to be set forth in separate counts.

If petitioner were right, a witness could effectively limit the sanction of contempt by general pronouncements as to the classes of questions he would or would not answer. But such a broad power to "pick and choose" has never belonged to the witness (A. 7), and the courts have not hesitated to use their authority to quell continued defiance. For instance, in *United States* v. *Costello,* 198 F. 2d 200 (C. A. 2), certiorari denied, 344 U. S. 874, the defendant refused to testify before a Congressional Committee because of illness; he repeated his refusal the next day for the same reason and the court found that the refusals constituted two separate offenses of con-

tempt. In *Fisher* v. *Pace*, 336 U. S. 155, the court substantially increased a fine and imposed a prison sentence for persistent refusal to obey its order. In *United States* v. *Bollenbach*, 125 F. 2d 458 (C. A. 2), two judgments were rendered against the defendant for misconduct in the courtroom; the judgments were pronounced on the same day and each sentenced defendant to three months imprisonment, to be served consecutively. See also *Emspak* v. *United States*, 349 U. S. 190, 193, 195, 203.

It is true that when a witness refuses to give testimony the contempt cannot be multiplied by continuing to ask the same question in different form. The cases petitioner cites are of this class. In *United States* v. *Orman*, 207 F. 2d 148 (C. A. 3) (Pet. 21), the court found that a defendant could not be charged on two separate counts for contempt in refusing to deliver his book accounts to a Senate Subcommittee, and that two separate refusals to give the name of a person who had loaned money to him should be treated as one offense. In *Fawick Airflex Co.* v. *United Electrical, R. & M. Wk'rs.*, 92 N. E. 2d 431 (Pet. 21), the holding was that a refusal to answer three separate inquiries as to whether defendant was a Communist should be treated as a single offense. And in *Maxwell* v. *Rives*, 11 Nev. 213 (Pet. 21), refusal to answer separate questions as to how defendant became possessed of the gold bullion in dispute was treated as one contempt.

This case does not fall under that principle because the separate questions were not mere repetitions of an inquiry petitioner had already refused to answer. The questions did not "seek to establish but a *single fact,* or relate to but a *single subject of inquiry*" (*United States* v. *Orman, supra,* 207 F. 2d at 160, emphasis added), but rather sought to prove a number of facts and related to at least as many subjects as the persons named in the questions. Petitioner's broad pronouncement on June 26 did not transform the prosecutor's subjects of inquiry from the Communist connections of the various co-conspirators—matters thoroughly relevant to the trial then going on—into a single inquiry into whether petitioner knew any Communists at all. If the latter had been the sole purpose of the series of questions, perhaps petitioner's arguments would have some weight. But that was not the prime or the only purpose of the inquiries, and accordingly petitioner cannot properly claim that the questions were really repetitious or attempts to reframe a single inquiry. By the same token, it makes no difference that her reasons for refusing to answer the various subjects of inquiry were substantially the same; the important factor is the diversity of the subjects, not the identity of the petitioner's motivations.

We may put aside petitioner's argument that it was possible for her to be sentenced to life, for

her sentences on the separate counts were made to run concurrently. The sentences in the cases cited as in conflict with the decision below (Pet. 21) were consecutive and resulted in prison terms of some years. Likewise, there is no merit to the argument that the sentences violated the constitutional provison against double jeopardy since, as we have shown, the contempts of June 30 were separate and distinct from those of June 26.

Moreover, it should not be forgotten that the order of June 26 was one in civil contempt. According to petitioner's contention that that order exhausted the court's powers, the court would be powerless to impose criminal punishment once it had issued the civil order. But it is settled that contempt may be punished both civilly and criminally, and in separate proceedings. *United States* v. *United Mine Workers,* 330 U. S. 258, 298–301; *infra,* pp. 15–18.

II

Petitioner contends that the court was without power to impose punitive punishment in proceedings essentially civil in character and purpose (Pet. 23). This argument overlooks the fact that almost any contempt has both civil and criminal characteristics. *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329; *Lamb* v. *Cramer,* 285 U. S. 217, 221. A refusal to obey an order of the court is not

only an affront to the dignity of the court, but it may also prejudice the case of the opposing party. If the punishment is punitive—to vindicate the authority of the court and to deter other like derelictions—the contempt is considered criminal. On the other hand, if the defendant is imprisoned to coerce him to do what he has refused to do, and if the imprisonment is merely to continue until he has performed the act, then the contempt is normally a civil one. *United States* v. *United Mine Workers of America,* 330 U. S. 258; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441; *Lamb* v. *Cramer,* 285 U. S. 217; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324. In *United States* v. *United Mine Workers, supra,* the court found that defendant's conduct amounted to both civil and criminal contempt and imposed a punitive fine of $700,000 and an additional fine of $2,800,000 to be paid in the event the defendant did not comply with its order within five days.

The present case was clearly one of criminal contempt. The petitioner refused to answer questions after being ordered by the court to do so. The judge at the conclusion of the day's session advised her: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a)" (87 Tr. 11634). Upon the request of counsel he did not sentence her

immediately.[5] She was returned to the custody of the marshal, not because of her failure to answer the eleven questions put to her on June 30, but for her contempt of four days previous. That the order *in this case* was criminal was indicated by the title of the order, by the certificate which specified the manner in which petitioner had defied the court's orders to answer the questions, and by the judgment which stated that she had been convicted of eleven separate criminal contempts by wilful refusal to answer eleven questions in disobedience of the court's order (R. 3–15, 17). Following the sentence, the court again stated that the purpose of the sentence was to vindicate its authority. Furthermore, it was understood by the parties that this was an order in criminal contempt (R. 23). In *United States* v. *United Mine Workers, supra,* the court treated an order as one in criminal contempt, although it was not described as such, as required by the Criminal Rules, but was so understood by the parties.

This criminal proceeding did not become a civil one because the trial judge indicated that he would modify the sentence within sixty days, under Rule 35 of the Rules of Criminal Pro-

[5] It is established practice for a trial judge to reserve punishment of contempts by participants in a criminal trial. *Hallinan* v. *United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952; *MacInnis* v. *United States*, 191 F. 2d 157 (C. A. 9), certiorari denied, 342 U. S. 953; *Sacher* v. *United States*, 343 U. S. 1.

cedure, if petitioner would purge herself. This was, as the court below pointed out (A. 3), a matter of grace going to the sentence and to the vindication of the court's authority, not an effort to coerce testimony for the Government's benefit. The trial judge's remarks make it clear that he continued to view the proceeding, at all times, as one to vindicate the court's authority (R. 27–28). And, of course, the fact that the indirect effect of petitioner's purging herself might be of aid to the Government would not change a solely punitive sanction to one which is merely coercive; that is normally true of punishment for criminal contempt. See *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 443.*

III

Petitioner also contends that the punishment of one year for the eleven contempts was excessive (Pet. 26). Punishment for contempt committed in the presence of the court is within the discretion of the trial judge and the higher courts will not intervene unless there has been an abuse of judicial discretion. Cf. *Fisher* v. *Pace*, 336 U. S. 155, 161; *Ex parte Terry*, 128 U. S. 289, 302–303; *MacInnis* v. *United States*, 191 F. 2d

* It is not uncommon for sentences in criminal contempt to provide for a fixed term or until such time as the defendant might purge himself. See, *e. g.*, *Field* v. *United States*, 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916.

157, 162 (C. A. 9), certiorari denied, 342 U. S. 953; *In re Maury,* 205 Fed. 626 (C. A. 9).

In the present case, petitioner wilfully refused to obey eleven specific orders of the trial judge when directed to do so in his presence. For this offense, the punishment of one year was not excessive. Title 18, Section 402, United States Code, which provides that contempt may be punished by fine, not exceeding $1,000, or by imprisonment, not exceeding six months, or both, expressly excepts contempt committed in the presence of the court. Title 2, Section 192, United States Code, imposes a maximum sentence of twelve months for refusal to answer any question relative to any subject under investigation in a Congressional Committee. Under this statute judgments have imposed sentences of one year and of eighteen months. *United States* v. *Orman,* 207 F. 2d 148 (C. A. 3); *United States* v. *Costello,* 198 F. 2d 200 (C. A. 2), certiorari denied, 344 U. S. 874.[7]

[7] The cases cited by petitioner (Pet. 26), in which sentences were reduced, are of an entirely different order. In *United States* v. *United Mine Workers,* 330 U. S. 258, the court found that a fine of $3,500,000 against the union for failure to obey an injunction was excessive and modified the judgment; it directed the union to pay a fine of $700,000 and an additional fine of $2,800,000 unless it complied with its order within five days. In *Weems* v. *United States,* 217 U. S. 349, the ruling was that a punishment of a fine of 4,000 pesos and imprisonment in chains for twelve years at hard labor for making false entries in a public record was excessive. In *Sacher* v. *Association of the Bar of the City of New York,*

Speaking of contempt committed in a court's presence, this Court in *Fisher* v. *Pace, supra,* 161, stated:

> In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge.

Likewise, the Court of Appeals in *Hallinan* v. *United States,* 182 F. 2d 880, 888 (C. A. 9), certiorari denied, 341 U. S. 952, pointed out, "We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice." The trial judge here may well have felt that petitioner took the stand intending not to answer certain questions and that her persistent refusal to answer was part of a course of conduct to flout the authority of the court (A. 33). Whether this was the case was a matter for the trial judge to decide. The sentence imposed was not excessive by the standards

347 U. S. 388, the court held that it was excessive punishment to disbar permanently Mr. Sacher from the practice of his profession for his misconduct during a trial, when Mr. Sacher had already served a six months sentence for the same conduct.

set by statutory and case law. There was no abuse of discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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